

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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KENNETH DRAKE,

Plaintiff,

v.

LOWE'S COMPANIES, INC.,

Defendant.

NO. CIV. S-04-0142 FCD JFM

MEMORANDUM AND ORDER

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This matter is before the court on motion by defendant,  
Lowe's Companies, Inc. ("defendant"), for attorney's fees  
pursuant to Federal Rule of Civil Procedure 54.<sup>1</sup>

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<sup>1</sup> Because oral argument will not be of material assistance, the court orders the matter submitted on the briefs.  
E.D. Cal. L.R. 78-320(h).

**BACKGROUND<sup>2</sup>**

On August 22, 1994, defendant hired Kenneth Drake ("plaintiff") to work at one of its retail stores in Indiana. After the hiring, the parties entered into an employment contract which was signed and executed in Indiana. Plaintiff transferred to work at defendant's store in Temecula, California in October 1999. Plaintiff then received a promotion to work at defendant's store in Vacaville, California in March 2001, where plaintiff managed the store for two years.

Desiring to return home to Indiana, plaintiff applied for and defendant approved a transfer to work as a store manager for one of defendant's stores in Indiana. Plaintiff's last day at the Vacaville store was January 31, 2003. On February 1, 2003, plaintiff requested one of his former subordinates pay him \$1,502.00 to redeem some of his accrued vacation time. His subordinate complied by paying him \$1,502.00 in cash from the store safe.

On February 5, 2003, plaintiff's supervisor at the Indiana store questioned plaintiff regarding the cash withdrawal. Plaintiff admitted that he withdrew the cash from the Vacaville store safe. Plaintiff's supervisor consulted with defendant's human resources department and determined that plaintiff should be terminated for withdrawing the cash without approval. Plaintiff was terminated on February 7, 2003.

Plaintiff filed the instant complaint in Solano County Superior Court, seeking damages for 1) breach of implied-in-fact

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<sup>2</sup> The background facts are taken from the court's order awarding summary judgment to defendant, filed July 22, 2005.

1 contract, 2) breach of the covenant of good faith and fair  
2 dealing, 3) tortious discharge in violation of public policy, 4)  
3 unfair competition under California Business and Professions Code  
4 section 17200, and 5) waiting time penalties under California  
5 Labor Code section 203. (First Amended Complaint ("FAC"), Exh. A  
6 to Def.'s Notice of Removal, filed January 22, 2004.) Defendant  
7 removed the action to this court on January 22, 2004 and  
8 subsequently filed a motion to dismiss, which this court denied.  
9 (Mem.& Order Mot. Dismiss, filed May 21, 2004.)

10 Defendant moved for summary judgment on June 7, 2005. The  
11 court granted defendant's motion in its entirety. (Mem. & Order,  
12 filed July 22, 2005.) After applying a conflict of law analysis  
13 for plaintiff's tort and statutory claims (claims three through  
14 five), the court determined that Indiana law applied and  
15 dismissed these claims on the basis of Indiana law. (Id. at 13-  
16 18.) As to plaintiff's contract-based claims (claims one and  
17 two), the court alternatively applied both California and Indiana  
18 law. As to these claims, the court did not engage in a conflict  
19 of law analysis because the application of either state's laws  
20 resulted in dismissal of the claims. (Id. at 7-11.)

21 Defendant subsequently filed the instant motion seeking, as  
22 the prevailing party on the summary judgment motion, reasonable  
23 attorney's fees pursuant to California Labor Code section 218.5.  
24 (Def.'s Mot. Att'y Fees, filed August 22, 2005.)

#### 25 ANALYSIS

26 Defendant brings this motion under Federal Rule of Civil  
27 Procedure 54. Rule 54 establishes the procedure to obtain  
28 attorney's fees, and a party seeking attorney's fees must provide

1 another source for the award of fees such as a rule, statute, or  
2 contract.<sup>3</sup> Fed. R. Civ. P. 54(d)(2); MRO Commc'ns, Inc. v. AT&T  
3 Co., 197 F.3d 1276, 1282 (9th Cir. 1999). Here defendant brings  
4 this Rule 54 motion alleging that it is entitled to attorney's  
5 fees under California Labor Code section 218.5.

6 **I. Application of California Labor Code section 218.5**

7 Setting aside any choice of law issues, the parties first  
8 dispute whether California Labor Code section 218.5 applies to  
9 the instant case, which does not raise the statute directly and  
10 which largely involves non-Labor Code claims.<sup>4</sup> Section 218.5  
11 provides:

12 In any action brought for the nonpayment of wages,  
13 fringe benefits, or health and welfare or pension  
14 fund contributions, the court shall award reasonable  
15 attorney's fees and costs to the prevailing party if  
16 any party to the action requests attorney's fees and  
17 costs upon the initiation of the action.

18 Cal. Lab. Code § 218.5. Courts have applied Section 218.5 to  
19 claims that arise outside of the Labor Code. Leighton v. Old  
20 Heidelberg, Ltd., 219 Cal. App. 3d 1062, 1078 (1990) (awarding  
21 plaintiff attorney's fees under Section 218.5 for claims of  
22 wrongful termination and breach of the covenant of good faith and

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22 <sup>3</sup> Rule 54(d) allows its requirement of filing 14 days  
23 from judgment to be modified if a statute provides otherwise or  
24 by order of the court. "Local Rules are standing court orders  
25 for purposes of Rule 54(d)." Eastwood v. National Enquirer, 123  
26 F.3d 1249, 1257 (9th Cir. 1997); see also Port of Stockton v.  
27 Western Bulk Carrier KS, 371 F.3d 1119, 1122 (9th Cir. 2004)  
(modifying Rule 54(d) to incorporate a 30-day time limit from  
28 Eastern District Local Rule 54-293). Here, defendant filed its  
motion for fees on August 22, 2005, within the requisite 30-day  
filing period.

<sup>4</sup> As stated above, the Labor Code is raised by plaintiff  
only with regard to a claim for waiting time penalties.

1 fair dealing); Mandelaris v. McGraw-Hill Broad. Co., 1 Wage &  
2 Hour Cas. 2d (BNA) 64, 1992 U.S. Dist. LEXIS 17818 (D. Cal. 1992)  
3 (applying Section 218.5 to a breach of contract claim). Thus,  
4 the court finds that Section 218.5 is not limited to claims  
5 brought under the statute specifically or under the Labor Code  
6 generally.

7 Nevertheless, to be applicable, Section 218.5 requires that  
8 plaintiff seek recovery for the "nonpayment of wages." Plaintiff  
9 maintains he did not seek "unpaid wages" in his pleadings. (Id.)  
10 The court rejects plaintiff's argument as he expressly sought  
11 such wages in paragraphs 19, 24, and 32 of the first amended  
12 complaint:

13 In addition, Defendant terminated Plaintiff for the  
14 purpose of depriving Plaintiff of vacation pay and  
15 other compensation to which Plaintiff was legally  
16 entitled under the California Labor Code, as identified  
17 herein, and applicable wage and hour laws. (1st Am.  
18 Compl. ¶ 19.)

17 As a proximate and legal result of Defendant's  
18 violation of said implied covenant of good faith and  
19 fair dealing, Plaintiff has suffered contract economic  
20 damages and has incurred substantial losses in wages,  
21 earnings, bonuses, deferred compensation, and other  
22 employee benefits and costs incurred in seeking  
23 substitute employment, all to his damage in an amount  
24 according to proof. (1st Am. Compl. ¶ 24.)

21 As a proximate and legal result of the Plaintiff's  
22 termination from employment in violation of public  
23 policy, Plaintiff has suffered and continues to suffer  
24 substantial losses in the form of past and future wages,  
25 earnings, bonuses, deferred compensation, other  
26 employment benefits and consequential damages which  
27 damages Plaintiff would not have incurred had Defendant  
28 not tortiously discharged Plaintiff, plus expenses  
incurred in obtaining substitute employment, all to  
Plaintiff's damage in an amount according to the proof.  
(1st Am. Compl. ¶ 32.)

As such, *if* California law applies (which is discussed below),

1 Section 218.5 could be a source of fees in this case.<sup>5</sup>

2 **II. Application of California Labor Code section 218.5 to**  
3 **Claims Decided Under Indiana Law**

4 The parties next dispute whether Section 218.5 may serve as  
5 a basis for an award of fees in this case where the underlying  
6 claims were, in large part, resolved on the basis of Indiana law.  
7 In MRO, the Ninth Circuit held that "[i]n an action involving  
8 state law claims, we apply the law of the forum state to  
9 determine whether a party is entitled to attorneys' fees, unless  
10 it conflicts with a valid federal statute or procedural rule."  
11 197 F.3d at 1282. Defendant argues that MRO thus compels this  
12 court to apply Section 218.5 because California is the forum  
13 state. (Def.'s Suppl. Br., filed September 23, 2005, at 2). The  
14 award of attorney's fees here, however, is not susceptible to  
15 such a conclusory analysis.

16 As plaintiff correctly points out, MRO did not address the  
17 instant issue of applying the forum state's attorney's fees  
18 provision when the substantive claims were governed, or governed,  
19 at least, alternatively, by the laws of a foreign state. Rather,  
20 at issue in MRO was whether Federal Rule of Civil Procedure 68  
21 (regarding offers of judgment), as opposed to Nevada state law,  
22 should apply to an award of attorney's fees to the defendant who

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23  
24 <sup>5</sup> The court additionally rejects plaintiff's argument  
25 that fees are not permitted under Section 218.5 because defendant  
26 failed to specifically request such fees under Section 218.5.  
27 Section 218.5 requires a party to request attorney's fees upon  
28 the initiation of the action. Here, defendant requested,  
generally, in its answer attorney's fees. (Def.'s Answer, filed  
June 17, 2004, at 9). A plain reading of the statute does not  
require a specific request for fees under the Section ("if any  
party to the action requests attorney's fees and costs upon the  
initiation of the action").

1 prevailed on the plaintiff's Nevada state laws claims. MRO at  
2 1283.<sup>6</sup> To the contrary, the question here is whether the forum  
3 state's law pertaining to attorney's fees applies where the  
4 underlying claims were resolved primarily on a foreign state's  
5 law and where the foreign state's law *conflicts* with the forum  
6 state's law on attorney's fees.

7 When a foreign state's substantive law applies, rather than  
8 the law of the forum state, federal courts will apply the foreign  
9 state's law in awarding attorney's fees. Cutler v. Bank of Am.  
10 Nat'l Trust & Sav. Ass'n, 441 F. Supp. 863, 864-865 (D. Cal.  
11 1977). At issue in Cutler was whether English law or California  
12 law applied to an award of attorney's fees. Id. at 864. The  
13 plaintiff, Cutler, sued the defendant Bank of America for the  
14 loss of property which resulted from a robbery at a bank branch  
15 in England. Id. The court found that English law governed the  
16 plaintiff's substantive claims for punitive damages, intentional  
17 infliction of emotional distress, and conversion. Id. Applying  
18 California choice of law principles, the court found that English  
19 law should also apply in awarding attorney's fees. Id. at 867.  
20 The court noted, "a California court would look to the *governing*  
21 *substantive law* to determine the appropriateness of an award of  
22 attorneys' fees under the circumstances." Id. at 865 (emphasis  
23 added). In that case, the court had determined that the  
24 governing substantive law was English law. Other federal courts  
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26 <sup>6</sup> While it was not clear whether the district court  
27 applied Nevada law or New Jersey law to the state law claims, the  
28 Ninth Circuit did not need to make such a determination because  
the law of both states compelled the *same* result--an award of  
attorney's fees to the prevailing party. MRO at 1281-1282.

1 have similarly applied a foreign state's laws in awarding fees.  
2 DeRoburt v. Gannett Co., 558 F. Supp. 1223, 1226 (D. Haw. 1983);  
3 McMahan v. Toto, 256 F.3d 1120, 1135 (11th Cir. 2001) (*rescinded*  
4 on other grounds); Atchison Casting Corp. v. Dofasco, Inc., 1995  
5 U.S. Dist. LEXIS 17367 (D. Kan. 1995).

6 \_\_\_\_\_Applying these principles here, the court clearly applied  
7 Indiana law to plaintiff's tort and statutory claims. (Mem. &  
8 Order at 16.) On this point, defendant must concede California  
9 law is not applicable. As such, the *California* Labor Code cannot  
10 serve as a basis for an award of fees on these claims as it is  
11 not the "governing substantive law."

12 With respect to plaintiff's contract-based claims, however,  
13 the court applied, alternatively, both California and Indiana law  
14 in dismissing the claims. (Id. at 8.) Defendant thus argues  
15 that because California law was applied, an award of fees is  
16 appropriate based on Section 218.5, at least in part, based on  
17 plaintiff's first and second claims for relief. In ruling on the  
18 summary judgment motion, the court did not determine which  
19 state's law ultimately applied to the contract claims under a  
20 conflict of law analysis because it was not necessary in that  
21 application of either state's law resulted in dismissal of  
22 plaintiff's claims. (Id.)

23 The court must therefore determine whether Section 218.5  
24 should apply to the contract claims when both state's laws were  
25 applied and no express finding was made regarding the choice of  
26 law question. To resolve this question, the court finds Anderson  
27 v. Savin Corp., 206 Cal. App. 3d 356 (1988) instructive. The  
28 court in Anderson found that when there is no conflict between



1 the law of two jurisdictions because the result is the same under  
2 either the forum or foreign state's law, a court may apply the  
3 law of the foreign state in conformance with the "reasonable  
4 expectations of the parties." Anderson, 206 Cal. App. 3d at 366;  
5 see also DeRoburt, 558 F. Supp. at 1227 (considering the  
6 "reasonable expectations of the parties" in awarding attorney's  
7 fees). The plaintiff, in Anderson, was hired by the defendant  
8 Savin Corporation as a photocopier salesperson under an  
9 employment contract which contained a choice of law provision  
10 requiring application of New York law. Id. at 360. Anderson was  
11 subsequently terminated for making racially and sexually  
12 derogatory comments to a defendant trainee. Id. Anderson filed  
13 suit alleging wrongful discharge along with six other claims for  
14 relief related to his termination. Id. at 360-361. At issue  
15 before the court was whether New York law determined Anderson's  
16 employment rights and precluded an at-will employee from  
17 maintaining a cause of action for wrongful discharge. Id. at  
18 361. The court found no conflict existed between California and  
19 New York law with regard to wrongful discharge as applied to the  
20 facts of the case. Id. at 366. The court found that in such a  
21 situation, when two states' laws may apply but no conflict  
22 exists, it may nevertheless be appropriate to apply the law of  
23 the *non-forum* state to adjudicate substantive claims. Id.  
24 "Under such circumstances, California will apply the law of the  
25 foreign jurisdiction in conformance with the reasonable  
26 expectations of the parties." Id.

27 Applying Anderson to the instant case, although the contract  
28 here did not contain a choice of law provision, it is reasonable

1 to conclude that the parties expected the employment contract to  
2 be governed by Indiana law. Specifically, plaintiff was hired by  
3 defendant to work at one of its retail stores in Indiana, entered  
4 into his employment contract in Indiana, and ultimately requested  
5 transfer back to Indiana where he was terminated. (Mem. & Order  
6 at 2-5.) In addition, defendant applied its Indiana policy and  
7 Indiana law in distributing plaintiff's final pay. (Id. at 5.)  
8 Thus, the court finds that even with respect to plaintiff's  
9 contract based claims, Indiana law should apply in determining  
10 whether attorney's fees are appropriate.

11 On the issue of Indiana law, defendant has not cited, and  
12 the court is not aware, of any applicable Indiana authority  
13 allowing an award of attorney's fees on the facts of this case.  
14 Therefore, defendant's motion for attorney's fees is DENIED in  
15 its entirety.

16 CONCLUSION

17 For the foregoing reasons, defendant's motion for attorney's  
18 fees is DENIED.

19 IT IS SO ORDERED.

20 DATED: October 11, 2005

21 /s/ Frank C. Damrell Jr.  
FRANK C. DAMRELL, Jr.  
22 UNITED STATES DISTRICT JUDGE  
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